U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: September 21, 1999

CASE NO: 1997-INA-100

In the Matter of

FLOREA MIRCEA
Employer

on behalf of

EUGENIA RIZESCU
Alien

Appearances: Mary Elizabeth Orr, Esq.
For Employer and Alien

Certifying Officer: Paul R. Nelson, Region IX

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Florea Mircea's[1] ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

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[1]We note that on the Form ETA 750 Application for Alien Labor Certification, the Employer lists his name as "Florea Mircea", however, when the question of Employer's name was raised by the CO in the NOF, the Employer submitted his U.S. passport, which provides the name Michael Florea, and his Social Security Card, which provides the name Mircea Florea. Employer contends that Michael is the U.S. variation of Mircea. (AF 15 & 20-21).

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On February 15, 1994, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the California Employment Development Department ("EDD") on behalf of the Alien, Eugenia Rizescu. (AF 27-29). The job opportunity was listed as "COOK, DOMESTIC SERVICE". (AF 27). The job duties were described as follows:

> The occupant of this position will be required to cook, season and prepare a variety of meat, fish, chicken dishes, soups, rice, salads according to my recipes and instructions or drawing on own cooking skills. Will also be required to plan menus and order foodstuffs. The occupant of this position will be required to serve meals and then after the meals are over, will clean up the kitchen area and cooking utensils. Will serve and cook both lunch and dinner for family of 4 and several guests. In this respect, the occupant will be required to determine how many will be at each meal in order to plan the menu each day.
>
> Occupant will not be responsible for any housekeeping duties, since these will be performed by a housekeeping agency.

(AF 27 & 29). The stated job requirements for the position, as set forth on the application, are two years experience in the job offered. In addition, personal references were required. (AF 27). The total hours per week for this position were listed as 40 basic hours and 14 hours of over time Monday through Saturday. (Id.).

The CO issued a Notice of Findings ("NOF") on August 30, 1995, proposing to deny certification. (AF 22-25). First, the CO found that the job offer constituted a non-existent business or job opening and questioned the Employer's ability to provide permanent, full-time employment to a U.S. worker, citing 20 C.F.R. 656.3. Second, citing section 656.21(b)(2)(i)(A), the CO found that the job requirement of a 54-hour work week is considered a restrictive requirement. (AF 23). The CO instructed the Employer that these findings could be rebutted by submitting evidence demonstrating the Employer's ability to offer permanent, full-time employment and by either deleting or altering the restrictive requirement or by justifying the requirement based on "business necessity." (Id).

The Employer, through counsel, submitted its rebuttal on September 29, 1995 (AF 14-21). The Employer's counsel argued that the information requested by the CO regarding whether there was a full-time position was "not a proper inquiry" in light of pre-BALCA Administrative Law Judge decisions that hold it is beyond the CO's authority to make a determination concerning whether the duties to be performed are necessary or whether they could be performed in less than 40 hours per week. (AF 14). In addition, counsel argued that the Employer's gross income of nearly $100,000 per year was sufficient to provide full-time employment and submitted the Employer's tax returns. (AF 15). Counsel contended that the job offer bore more than a reasonable relationship to that of domestic cook as outlined in the Dictionary of Occupational Titles ("DOT"). Finally, counsel argued that whether the job requirements can be done in 40 or 54 hours was immaterial as long as the Employer was in compliance by making the same terms available to U.S. workers, and that an no amendment would be made to the offer of employment on a 40 hour, rather than 54 hour per week basis, because to do so would be contrary to the position actually available. (AF 14-15).

A Supplementary NOF ("SNOF") was issued by the CO on January 24, 1996, to allow the Employer an opportunity to correct the deficiencies which arose as a result of Employer's rebuttal. (AF 11-12). In the SNOF, the CO stated that the instructions in the corrective action section of the NOF were not followed. Specifically, the CO found that the Employer failed to rebut the unduly restrictive job requirement finding. (AF 12).

The counsel for the Employer submitted a response to the SNOF on February 26, 1998. (AF 7-10). The Employer provided responses to questions raised in the original NOF regarding the job duties and the estimated time of completion. Counsel asserted that these duties accounted for 8 hours a day, however, there was no documentation provided supporting the Employer's requirement of a 54-hour work week. In addition, counsel asserted that there was a need in certain affluent families for a full-time cook, and that the Employer feels that he is "entitled to the United States dream of now being in a position to hiring a full time employee (THAT IS A FULL TIME DOMESTIC COOK) to relieve his wife of these functions." (AF 8) (emphasis in original).

The CO issued a Final Determination on May 2, 1996, denying certification on the grounds that there was no bona fide permanent, full-time position to which U.S. workers can be referred, and because the Employer did not justify the unduly restrictive requirement of a 54-hour work week. (AF 5-6).

The Employer filed a Request for Review on August 15, 1996 (AF 2-4). Employer's brief on appeal was submitted by Employer's counsel on February 24, 1997.

Discussion

In *Elain Bunzel*, 1997-INA-481 (Mar. 3, 1999) (*en banc*), the Board held that a CO may reasonably inquire into whether a job constitutes full-time employment, but noted that in *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (*en banc*), it found little relevance in whether the worker's duties require constant work for the entire day, provided that the work day is customary for a full-time employee in the industry or under an employer's special circumstance. In *Bunzel*, the Board held that "if a CO's questions about the full-time nature of the duties are, in reality, a requirement that the employer establish the 'business necessity' for the position, the inquiry is not reasonable." Slip. op. at 3. Nevertheless, a CO may reasonably ask for the same type of information in an analysis of a *bona fide* job opportunity, under the totality of the circumstances test, pursuant to 20 C.F.R. § 656.20(c)(8). *See Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). Moreover, *Bunzel* clarified that *Schimoler* does not change the CO's authority to inquire about the employer's *ability* to offer permanent, full-time work or an employer's sufficiency of funds to pay the alien's salary.

In the instant case, the CO's analysis of a "non-existent job opening", (see NOF, AF 23), focused on whether the job duties would keep the worker occupied through out the work day. Since the CO focused exclusively on section 656.3, however, the Employer's defense to this information request may have had at least limited justification.

Nevertheless, Employer's refusal to provide documentation rebutting the CO's finding of an unduly restrictive requirement pursuant to 20 C.F.R. § 656.21(b)(2)(i)(A) is without justification. The CO found that the requirement of a 54 hour work week was be unduly restrictive and Employer's rebuttal failed to either delete or amend the requirement or justify it based on business necessity. Where the CO requests relevant information that is reasonably obtainable, this Board has consistently held that an employer's failure to rebut the information is grounds to affirm the CO's finding that an employer failed to rebut the NOF. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). In this matter, the CO had the authority to inquire into directly relevant and reasonably obtainable documentation, and therefore the Employer was obligated to respond. *See id.*

This case is distinguishable from cases, such as *Mahein Azar*, 1996-INA-246 (Mar. 18, 1999). In those cases the CO relied almost exclusively on section 656.3, and the Board found that although the CO's approach was wrong, the relevancy of the questions was not, and therefore a remand was appropriate. Here, the CO relied on section 656.3 and section 656.21(b)(2)(i)(A) in denying certification. The Employer refused to provide documentation in response to either finding. The employer was not justified in refusing to answer the reasonable documentation request in a NOF.

Accordingly, we find the CO's denial of certification was proper.

Order

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California